REMOTENESS OF GENERAL POWERS

A GENERAL power of appointment exercisable only by will is void if the person to whom the power is given was unborn at the time when the instrument from which the ower is derived took effect.[1] The reason is that nothing can vest in any one under an exercise of the power except upon an event that may happen beyond the limit allowed by the rule against perpetuities. The effect is the same as if the instrument had contained a gift to the person himself, dependent upon an event that could not be ascertained until his death.

But it has been said in recent text books that a general power exercisable by deed or will may be given to the unborn child of a living person, and that the power will be valid although it may not be exercised until after the legal period. This proposition was stated in Farwell on Powers in 1874 in this form:

"A power of appointment among children is well executed by an appointment to one of them for life, with power to dispose of the capital by deed or will, whether such children were *in esse* at the creation of the power or not; for this in effect gives the whole beneficial interest to the appointee, and does not transgress any rule against perpetuity." [2]

Mr. Marsden followed in 1882 with the statement that a "general power of appointment exercisable by deed or will may be limited to an unborn person, provided he is to be born within the legal period," [3] and Mr. Gray says that a general power given to the unborn child of a living person to appoint by deed is not obnoxious to the rule against perpetuities.[4]

The only authority that is cited in support of this proposition is *Bray* v. *Bree*,[5] which was decided by the House of Lords in 1834.

[1] Morgan *v.* Gronow, L. R. 16 Eq. 1, 9–10 (1873); Wollaston *v.* King, L. R. 8 Eq. 165, 169–170 (1869); Tredennick *v.* Tredennick, [1900] 1 Ir. 354, 362.

[2] FARWELL, POWERS, 1 ed., 227, 257; 2 ed., 292, 322.

[3] MARSDEN, PERPETUITIES, 236, 252.

[4] GRAY, PERPETUITIES, §§ 477, 524.

[5] 8 Bli. 568; 2 Cl. & F. 453; S. C. nom. Bray *v.* Hammersley, 3 Sim. 513, 518 (1830).

Mr. Gray mentions, however, in the first edition of his book, that the question of remoteness was not suggested in the case either from the bench or at the bar.[6] Any authority that may be derived from the case must therefore rest on the assumption that the point was involved in the decision and must have received the consideration of the House of Lords. But an examination of the case will show that no such point was involved in it. It was not a case in which a mere *power*, in the ordinary sense of the word,[7] was limited to an unborn child, but the entire beneficial interest in the property was given to the child, who was then a married woman, for her separate use, with the power of disposition incident to the separate estate of married women. No question of perpetuity could have arisen as to the time of her exercising her right to dispose of her own property.

Her interest was derived from her mother's marriage settlement, by which a fund of £8000 was settled upon trust, after the deaths of the husband and wife, for the children of the marriage in such shares, and with such conditions, restrictions, and limitations for their benefit, as the wife, if she survived her husband, should by deed or will appoint. The wife survived the husband, and, after the marriage of her daughter, who was the only child, appointed by deed that the trustees should stand possessed of the fund (subject only to her own life interest) as follows:[8]

"upon trust immediately after her decease . . . to pay, assign, and transfer the said trust monies and securities . . . in such manner and form as Sarah Eliza Bray [her daughter] . . . by any deed or deeds, or writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament . . . to be by her signed and published in the presence of two or more credible witnesses, should direct or appoint; *and in default* of such direction or appointment and in the mean time until any such direction or appointment should be made . . . upon trust during the life of the said S. E. B. to receive and pay, apply, and dispose of the interest and yearly income of the said trust monies and securities . . . into the proper hands of her the said S. E. B., or otherwise to permit her to receive and take the same to and for her sole and separate use . . . *and from and after the*

[6] GRAY, PERPETUITIES, 1 ed., § 524.

[7] See Freme *v.* Clement, 18 Ch. D. 499, 504 (1881).

[8] 8 Bli. 569–570; 3 Sim. 516.

decease of the said S. E. B. should pay, transfer, and assign the said trust monies and securities . . . unto the executors or administrators of the said S. E. B. as part of her personal estate."

The daughter by her will, executed in the manner prescribed by the deed, gave the fund to her uncle. Her husband claimed it as her administrator, on the ground that the power in the marriage settlement was only a power of distribution and could not be exercised in the event of there being only one child, or, if it could, that it did not authorize an appointment to the daughter for her separate use or with a power of appointment, and that consequently the fund was vested in the daughter absolutely under the settlement, and (as she was a married woman) without any power of disposition by will.[9]

Sir E. Sugden, who supported the appointment, said that its effect was only to give in words what would have been implied in an appointment of the whole fund to the daughter for her separate use;[10] and, if her mother had simply given her such an estate, it would have included the powers that she had by this more enlarged and more formal disposition, only it would not have been necessary to have any certain number of witnesses, and all this was for her benefit.[11] It was not suggested that any other effect should be given to the appointment, and the whole contest was whether it was authorized by the settlement. Lord Brougham said that the question raised was twofold, and that the principal question, and the only one incumbered with the least doubt, was whether the power was a power of appointing, in the event which

[9] 8 Bli. 579–580, 587–588; 2 Cl. & F. 458, 459.

[10] The daughter's life interest was expressed to be for her separate use, and the ultimate trust for her executors or administrators was a gift to the daughter herself, as they would take it as a part of her estate. Attorney-General *v.* Malkin, 2 Ph. 64, 66, 68 (1846); Webb *v.* Sadler, L. R. 8 Ch. 419, 427 (1873). This was an absolute gift of the fund to the daughter, which vested in her mother's lifetime upon the execution of the deed of appointment. The trust for her separate use for life gave her power to dispose of her life interest, but not of her reversionary interest. Hanchett *v.* Briscoe, 22 Beav. 496, 502–504 (1856); Whittle *v.* Henning, 2 Ph. 731, 734 (1848). And the power to dispose of the fund by deed or will put her in the same position as to the whole fund as if it had been limited to her for her separate use. London Chartered Bank *v.* Lemprière, L. R. 4 P. C. 572, 595 (1873).

[11] 8 Bli. 594–596, 606. This part of the argument is not reported in 2 Cl. & F. 459–460. The opposing counsel were Sir C. Pepys (then Solicitor-General, and eighteen months afterwards Lord Chancellor as Lord Cottenham) and also Mr. Preston and Mr. W. Russell.

occurred, to one child, or only a power of distribution, and the other, on which he had no doubt, was whether the power was well executed.[12] Both questions were decided against the husband. As an absolute interest in the whole fund was thus vested in the daughter in her mother's lifetime, with all the incidents to which it would have been subject if the daughter had not been married,[13] the case did not involve the question of remoteness that would have arisen if the appointment had been to the daughter for life for her separate use, with a general power of appointing the fund by deed or will, and, in default of appointment, the fund had been limited to other persons.[14]

Lord St. Leonards in his books refers to this case only as showing a form of appointment that may be made under a power to appoint among children with restrictions and limitations for their benefit.[15] He does not anywhere suggest that a general power of appointment could have been given to the daughter without the ultimate limitation to her executors or administrators. He does however intimate the contrary, in discussing another subject, by the reasons he gives for his opinion that, when a person has a power to appoint to whomsoever he pleases, he may in point of perpetuity create the same estates as he might if he were the absolute owner. He takes the case of an owner of an estate in fee simple limiting the land to the use of such persons and for such estates as he himself should appoint, and in the mean time to the use of another person in fee, and says that, as regards the person who takes until appointment, no perpetuity is created *beyond the life of the donee* of the power, and when the power is executed, it is immaterial to him what estates are created, for, in whatever manner the fee is disposed of, his estate is defeated.[16] The donee in this example is

[12] 8 Bli. 614–615, 618, 619; 2 Cl. & F. 462–463, 467.

[13] Tullett *v.* Armstrong, 1 Beav. 1, 21–22 (1838); London Chartered Bank *v.* Lemprière, L. R. 4 P. C. 572, 591 (1873).

[14] The case was followed in Fry *v.* Capper, Kay 163, 170 (1853), and *In re* Teague's Settlement, L. R. 10 Eq. 564 (1870), where there were similar limitations with like ultimate gifts. In *In re* Meredith's Trusts, 3 Ch. D. 757, 760 (1876), where there was an appointment under a marriage settlement for a daughter for life, and after her death for such persons as she should appoint by deed or will, and in default of appointment for her children, the validity of the daughter's power was questioned, but was afterwards admitted, and there was no decision on the point.

[15] SUGDEN, PROPERTY, 490–491; SUGDEN, POWERS, 8 ed., 416, 683.

[16] SUGDEN, POWERS, 394–396.

a person living at the creation of the power, and the intimation is plain that, if the power of defeating the estate had not been confined to the legal period of time from the creation of the power, it would not have been valid.

The proposition that a power can be given to a person to dispose of property otherwise vested in other persons at a time more than twenty-one years beyond the duration of lives in being at the creation of the power is thus without the supposed sanction of the House of Lords. The case of *London & South Western Ry. Co.* v. *Gomm*[17] is a direct authority that such a power would not be valid. There, in a conveyance by an incorporated company, the grantee had covenanted that he, his heirs and assigns, at any time thereafter, upon a six months' notice in writing from the company and upon receiving from them £100, would execute a reconveyance of the land. The company claimed specific performance of this covenant against a person who had purchased the land from the heir of the grantee with notice of the covenant, and it was held that, as the covenant gave an interest in the land and was unlimited in point of time, it clearly was bad as extending beyond the period allowed by the rule as to remoteness, and could not be enforced against the purchaser. It was said by Jessel, M. R., that the right to call for a conveyance was an equitable interest in the land; that the person exercising the option had to do two things, he had to give notice of his intention and to pay the purchase money; and as regards remoteness there was no distinction between one kind of equitable interest and another; in all cases they must take effect against the owner of the land within a prescribed period. It seemed to him impossible to suggest any real distinction between the case of a limitation to A. in fee, with a proviso that, whenever a notice in writing is sent and £100 paid by B. or his heirs to A. or his heirs, the estate shall vest in B. and his heirs, and a contract that, whenever such notice is given and such payment made, A. shall convey to B. and his heirs. There was in each case the same fetter on the estate and on the owners of the estate for all time. Sir J. Hannen cited the passage from Sanders,[18] "a perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening

[17] 20 Ch. D. 562, 580–582, 586 (1882). See also Winsor *v.* Mills, 157 Mass. 362, 366, 32 N. E. 352, 353 (1892).

[18] SANDERS, USES & TRUSTS, 5 ed., 204.

the fee-simple of the property discharged of such future use or estate, before the event is determined," and added that "this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases."

The same rule is applicable when property is limited under a marriage settlement upon trust for such persons as a child of the marriage shall appoint by deed or will, and meanwhile and in default of appointment upon trust for the child for life. Until an appointment is made, the property will vest in the child for life and after his death in the persons entitled under the settlement in default of appointment. It is in effect limited to the child for life and after his death to certain specified persons, with a proviso that, when the child gives notice (by deed or will) of his desire that it shall go to other persons, then it shall go to them accordingly. The right and control of the child is dependent upon his giving the notice or making the appointment. As this may be done at any time during his life, it is plain that nothing could vest in him or in any one by an exercise of the power until a time that might be long after the legal limit. In the mean time the persons entitled in default of appointment would be restrained from aliening the property discharged from the possible future use. The property would thus be tied up during all that interval in the mode which Mr. Gray says that it was the purpose of the rule against perpetuities to prevent.[19] It would be tied up, until the exercise of the general power, in the same manner and to the same extent as it would be tied up by a special power to appoint by deed or will among particular objects, and such a special power is void if by its terms it may be exercised at a time beyond the legal period.[20]

A reason that has been given for treating a general power to appoint by deed or will as valid, although it be given to a person not born when the power was created, is that it gives him in effect the whole beneficial interest, or makes him practically the owner.[21] But whatever interest it gives him is dependent upon his exercising

[19] GRAY, PERPETUITIES, § 268.

[20] *In re* De Sommery, [1912] 2 Ch. 622, 630; Kennedy *v.* Kennedy, [1914] A. C. 215, 220; MARSDEN, PERPETUITIES, 239; GRAY, PERPETUITIES, §§ 473, 474; 30 L. QUART. REV. 72 (Jan., 1914).

[21] FARWELL, POWERS, 2 ed., 292, 322, *supra*, p. 664; GRAY, PERPETUITIES, § 477, appx., 3 ed., §§ 950, 962.

the power. A general power to appoint only by will also gives the donee an interest in the same sense. This is shown by *Phipson* v. *Turner*,[22] in which it was held that, under a power to appoint among children, an interest for life might be given to a daughter for her separate use, with a general power of appointment by will, for this was, "in fact, giving her an interest, though it is a more limited mode of giving her the property," and "during her own life she had an interest in the fund for her separate use, and she also had in herself that testamentary power which she might have exercised in the same manner as if she had been plenary owner of the fund in question." This was approved in *Slark* v. *Dakyns*,[23] in which the circumstances were similar. In these cases, however, the daughter, to whom the power to appoint by will was given, was born in the lifetime of the testator from whose will the power was derived. But in *Morgan* v. *Gronow*,[24] where a like power of appointment by will had been given under a marriage settlement to a daughter of the marriage, Lord Selborne held that the power was invalid, "inasmuch as nothing could vest in her, or her representative, or in any one else, under an exercise of the power, except at a time which might be beyond the limits allowed by the rule as to perpetuities." And he added, "It is the same as if there had been a gift to her for her own benefit dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time." So, if the power authorized an appointment by deed or will, nothing could vest in her or any one else under an exercise of the power except at a time which might be beyond the legal limit, for she would have her whole life in which she might exercise the power, and the time of her doing so would be as uncertain as that of death itself.

In *Gomm's Case*,[25] the right to call for a conveyance which gave the railway company an equitable interest in the land was held to be void for remoteness, because it might have been exercised at any time during the company's existence. The vesting of any interest under an exercise of a power to appoint by deed or will

[22] 9 Sim. 227, 245, 250–251 (1838).

[23] L. R. 10 Ch. 35, 40 (1874).

[24] L. R. 16 Eq. 1, 9–10 (1873); approving Wollaston *v.* King, L. R. 8 Eq. 165, 169–170 (1869).

[25] 20 Ch. D. 562 (1882), *supra*, p. 668.

depends in like manner upon the doing of the act prescribed in the power. As Mr. Gray expresses it, "the vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised; if the power can be exercised beyond the required limits, the condition precedent may be fulfilled beyond the limits, and therefore the interest appointed under the power will be too remote." Afterwards, in speaking of the estates that may be appointed under a power exercisable by deed, he says that whether the power is given to an unborn or to a living person, "such a power is not really a power at all, but is a direct limitation in fee." [26] This cannot mean, however, that the power gives an estate in fee unless it is exercised, and if the vesting of the estate is dependent on the exercise of the power, it is difficult to understand how such a power can be given to an unborn person unless he is in some way restricted to the legal period in exercising it.

In Davidson's Conveyancing [27] it is said, in a note, that "the writer conceives that until *Wollaston* v. *King* [28] was decided, the appointment there in question would have been considered by the profession to be within the authority of the prior cases, and to be protected by the principle on which those cases were founded, namely, that the general power of appointment (whether exercisable by deed or will, or by will only) is in substance part of the interest limited to the object of the special power." It was right to consider the general power as part of the interest limited to the object of the special power, where it was given to a living person, as in *Phipson* v. *Turner*,[29] and must therefore be exercised, if at all, within the legal limit. But it must have been overlooked that nothing would come of the interest unless the power were exercised, and that, if it were given to an unborn person, nothing could vest in any one under an exercise of the power until a time that might be beyond the legal limit. When it was decided in *Wollaston* v. *King* and *Morgan* v. *Gronow* [30] that a general power of appointment by will was void in such circumstances for that reason, it ought to have been recognized that a general power of appoint-

[26] GRAY, PERPETUITIES, 3 ed., appx. §§ 959, 962; *cf.* § 950.
[27] 3 DAVIDSON, CONVEYANCING, 3 ed., 157.
[28] L. R. 8 Eq. 165, 169–170 (1869).
[29] 9 Sim. 227, 245, 250–251 (1838).
[30] L. R. 16 Eq. 1, 9–10 (1873).

ment by deed or will would also be void in the like circumstances for the same reason.[31]

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[31] In a recent Canadian case, *Re* Phillips, 28 Ont. L. Rep. 94 (1913), a strange confusion was made in the application of the rule laid down in Wollaston *v.* King and Morgan *v.* Gronow. The testator, who died in 1910, gave his residuary estate in trust for his wife during her life or until her second marriage, and, after her death or marriage, in trust for his children then alive in equal shares, the issue of any then deceased child standing in its parent's place, with directions to pay to each of them the income of his or her share, and on the death of each to pay over his or her share *as such child or grandchild should by will appoint*, and in default of appointment to the persons entitled to his or her personal estate by statute in case of intestacy. He left surviving him a wife and seven children, all of whom seem to have been still alive. It is plain that, if a grandchild born after the testator's death should become entitled to a share, the limitation of his share to objects to be ascertained by his will or otherwise at his death would be too remote, and accordingly the power would be void as to such grandchild, and the judge so held, quoting (p. 97) the passage in Halsbury's Laws of England, vol. 22, p. 355. But he went on to say that the opposite view was taken in Farwell on Powers, 2 ed., 287, although in fact that book expresses exactly the same view (at p. 292) as the quotation from Lord Halsbury's book, and the passage at p. 287 relates to an entirely different subject, viz., the time from which the legal period runs in the case of an appointment under a general power to appoint by will, where the power is valid. He also thought he struck "a discordant note" in Rous *v.* Jackson, 29 Ch. D. 521 (1885) and *In re* Flower, 55 L. J. Ch. 200 (1885), but those cases also relate only to this latter question, and Lord Halsbury's book at p. 356 states the law exactly in accordance with them and with Farwell on Powers. It is clear, however, that, although the power of appointment would be invalid in the case of an afterborn grandchild, this did not affect its validity as to the shares of any of the children or of grandchildren living at the testator's death, for all the shares will be ascertained at the wife's death, or marriage, and the power applies to each of them separately, according to all the cases from Griffith *v.* Pownall, 13 Sim. 393 (1843), to *In re* Russell, [1895] 2 Ch. 698. The law is stated in Lord Halsbury's book at p. 346, and is the same here (Hills *v.* Simonds, 125 Mass. 536 (1878); Dorr *v.* Lovering, 147 Mass. 530, 18 N. E. 412 (1888). But the judge somehow got the impression from *In re* Bence, [1891] 3 Ch. 242, that the clause containing the power could not be split up, and accordingly held that the power and the alternative limitation were entirely void, and that the shares of the children and grandchildren must go to them absolutely under the original gift.